STATE OF MICHIGAN

COURT OF APPEALS

CARL D. BADOUR,

Plaintiff-Appellant,

v

JOHN P. PYRSKI,

Defendant-Appellee.

UNPUBLISHED
August 26, 2004

No. 249726
Ionia Circuit Court
LC No. 02-022526-NM

Before: Hoekstra, P.J., and Cooper and Kelly.

PER CURIAM.

Plaintiff appeals as of right the trial court's order quashing service of process and dismissing this legal malpractice case. We affirm.

I. Facts

After plaintiff received a notice of property forfeiture pursuant to MCL 333.7522 *et seq.*, plaintiff retained Walter Downes and later defendant to represent him in the forfeiture proceedings. The trial court ultimately ruled that plaintiff failed to timely file a property bond and entered an order forfeiting plaintiff's property. Plaintiff subsequently filed a legal malpractice claim against Downes for failure to timely file the bond. In that case, the trial court granted summary disposition to Downes after determining that the bond was actually filed timely.

On December 11, 2002, plaintiff filed a legal malpractice complaint against defendant alleging that defendant failed to argue that the property bond was timely filed and attempted to convince plaintiff that Downes' error caused the unfavorable outcome. From the correctional facility in Jackson, Michigan, plaintiff obtained a summons that expired on March 12, 2003. Plaintiff mailed the complaint and summons by certified mail to defendant at 40 Pearl Street, Grand Rapids. The postal service, noting that defendant had a change of address, delivered it to 909 E. Fulton Street, Grand Rapids. Plaintiff filed two copies of the certified mailing card signed by "Bev Reynolds" on December 17, 2002. On January 23, 2003, plaintiff filed an application for entry of default and mailed it to defendant at both 909 E. Fulton Street and 40 Pearl Street. The lower court entered default against defendant. On February 14, 2003, plaintiff filed a motion for entry of default judgment, again mailing the motion and notice of hearing to both addresses. On February 25, 2003, the trial court issued an order denying plaintiff's motion stating: "The service of process in this case does not comply with MCR 2.103." Plaintiff moved

for reconsideration or clarification. He also filed a motion to disqualify the judge, though he never noticed the motion for a hearing. On March 4, 2002, plaintiff again attempted service by process server. The affidavit of service filed with the court signed by Joe Hodges indicates that defendant was personally served with the summons and complaint on March 4, 2003, at 909 E. Fulton Street.

On March 10, 2003, defendant filed a "special appearance" to "object to the jurisdiction of the Court" and to "object to the defective Service of Process." At the same time, defendant filed a motion to quash service of process and a motion for summary disposition under MCR 2.116(C)(1), (2), and (3). In his attached brief, defendant stated: "Defendant is not appearing to address the merits of the complaint." Defendant attached to the brief his affidavit attesting that he was never served a summons and complaint and was not aware of a lawsuit filed against him. He stated: "I first became aware of the fact when the Default was entered by the Court and sent to me." In an additional brief in support of his motion, defendant attached the affidavit of Robert Charon, a private investigator, who stated that he interviewed Joseph Hodges who stated that he did not personally serve defendant and that the sworn statement on the proof of service was false. According to Charon, Hodges further stated that he completed the proof of service and had it notarized before he took the summons and complaint to defendant's address.

On March 24, 2003, plaintiff filed a response to defendant's motion stating that defendant's affidavit contained "intentional prevarications." He also asserted that he was prepared to subpoena Reynolds, defendant's associate, Hodges, and Hodges' mother. Plaintiff attached proof of defendant's correct mailing address. Plaintiff also attached an affidavit stating that he verified defendant's address and that Reynolds was an employee of defendant. Plaintiff further stated that none of the items he mailed to defendant at either address were ever returned to him by the postal service.

At the hearing on defendants' motions, the trial court ruled "based on the authority set forth in the defendant's brief and his argument here today that the request for relief is appropriate and I'll sign the order quashing the summons and service and dismissing the case."

II. Analysis

Plaintiff contends that the trial court erred in granting defendant's motion to quash service and dismissing plaintiff's legal malpractice claim against defendant. We disagree. This court reviews for an abuse of discretion the trial court's ruling to quash service and dismiss an action for lack of service. *Bush v Beemer,* 224 Mich App 457, 466; 569 NW2d 636 (1997); *Moyer v Lott,* 86 Mich App 186, 188; 272 NW2d 232 (1978).

The service of process rules are intended "to satisfy the due process requirement that a defendant be informed of the pendency of an action by the best means available, by methods reasonably calculated to give a defendant actual notice of the proceeding and an opportunity to be heard and to present objections or defenses." *Hill v Frawley,* 155 Mich App 611, 613; 400 NW2d 328 (1986). "Neither errors in the content of the service nor in the manner of service are to result in dismissal unless the errors are so serious as to cause the process to fail in its fundamental purpose." *Bunner v Blow-Rite Insulation Co,* 162 Mich App 669, 673-674; 413 NW2d 474 (1987).

Plaintiff did not effectuate service of process in accordance with MCR 2.105. Plaintiff's first attempt to serve the summons and complaint failed because the return receipt was not signed by defendant as required by MCR 2.105(A)(2). Plaintiff's second attempt to serve the summons and complaint by process server failed because the process server did not "deliver" the summons and complaint to defendant personally. MCR 2.105(A)(1). On appeal, plaintiff admits that Hodges only left the summons and complaint with defendant's secretary and associate with their assurances that defendant would receive it; he did not deliver it to defendant personally as required. While this Court has held that "in hand" delivery is not mandated, it further specified that "'[i]nforming the defendant of the nature of the papers, offering them to the defendant, and leaving them within the defendant's physical control ought to [and does] suffice to constitute 'delivery'" *Barclay v Crown Bldg & Development,* 241 Mich App 639, 647; 617 NW2d 373 (2000). Plaintiff did not inform defendant of the nature of the papers delivered, did not offer them to defendant, and did not leave the papers within defendant's physical control.

Yet plaintiff asserts that both deliveries should suffice because they were made to defendant's "personal agent." Indeed, MCR 2.105(H)(1) permits service "on an agent authorized by written appointment or by law to receive service of process." But although Reynolds may have been defendant's employee, there is no evidence in the lower court record that Reynolds was "authorized by written appointment or by law to receive service of process."

Even if it is true, as plaintiff asserts, that defendant "was trying to evade service," the rules for serving a party, even one who is trying to evade service, must be followed. Although plaintiff exerted a good deal of effort in attempting to serve defendant, those attempts failed to comply exactly with the service of process rules.

But failure to comply with these service of process rules is not always fatal. MCR 2.105(J)(3) states:

> An action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service.

Essentially, the resolution of this issue hinges on whether plaintiff's failure to satisfy the requirements of MCR 2.105 constituted a technical defect in the manner process was served, *Bunner, supra* at 674; *Hill, supra* at 613-614 or whether it constituted a lack of notice, *Holliday v Townley,* 189 Mich App 424, 425-426; 473 NW2d 733 (1991). While MCR 2.105(J)(3) forgives errors in the manner or content of service of process, it does not forgive a complete failure to serve process. *Id.* at 426.

Plaintiff argues that despite the errors in the manners of service, the trial court should not have quashed service because defendant had knowledge of the action before the summons expired. MCR 2.105(J)(3). We disagree. Plaintiff delivered the summons and complaint twice to Reynolds, not to defendant. And there is no evidence that defendant ever received the summons and complaint. Plaintiff argues that defendant must have had notice of the action because he filed an appearance in the case before the summons expired. While it is true that the summons expired on March 12, 2003, and defendant filed a appearance in the case on March 10, 2003, defendant never filed a general appearance. Rather, he entered a limited appearance solely to assert that he never received actual notice of the action. To "appear" means to act

"acknowledging jurisdiction of the court or invoking court action on [one's] behalf." *Vaillencourt v Vaillencourt*, 93 Mich App 344, 357; 287 NW2d 230 (1979). A party objecting the court's jurisdiction and filing a motion to quash service has not made a general appearance to argue the case on its merits. See *In Re Gordon Estate*, 222 Mich App 148, 158 n 9; 564 NW2d 497 (1997). Defendant's affidavit filed in the lower court indicates that he only learned that the action had been filed when he received the court's default notice. Because there is no evidence in the lower court record that defendant received actual notice of the action, the trial court did not abuse its discretion in granting defendant's motion to quash service.

Plaintiff also argues that the trial court should have ruled on his motion for disqualification before ruling on defendant's motion to quash service. MCR 2.003 governs the disqualification of a trial judge. MCR 2.003(C)(1) requires that a motion for disqualification be filed within fourteen days after the grounds for the disqualification are known by the moving party. Plaintiff moved for disqualification on the basis that the trial court presided over the underlying forfeiture case and would be called as a witness in this case. On appeal, plaintiff asserts that he knew of the grounds for disqualification after consulting with an experienced paralegal. But we conclude that plaintiff *knew* of the grounds for disqualification when the trial court was assigned to this case. Plaintiff *understood* that this could be grounds for disqualification when he consulted with the paralegal. Accordingly, plaintiff did not file the motion within fourteen days after he knew of the grounds for disqualification. Additionally, our review of the lower court record indicates that plaintiff failed to include an affidavit with his motion, which is required by MCR 2.003(C)(2). Furthermore, because plaintiff never noticed the motion for hearing, the motion was never brought to the trial court's attention. At the hearing on defendant's motion to quash service, the trial court noted for the first time that plaintiff had filed a motion for disqualification, but had never scheduled a hearing for the motion. Under these circumstances, the trial court did not err in ruling on defendant's motion to quash service.

Plaintiff also asks us to review the motion for disqualification.[1] But because of its procedural errors and because the motion was never addressed by the trial court, we decline to address this unpreserved issue. *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993); *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999); *People v Bettistea*, 173 Mich App 106, 123; 434 NW2d 138 (1988).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jessica R. Cooper
/s/ Kirsten Frank Kelly

[1] While plaintiff raises this issue in his brief on appeal, he denies that the issue was raised in his reply brief on appeal.